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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
By Its Attorney General,
JOHN K. VAN DE KAMP,
Petitioner,

vs.

AMERICAN STORES CO., ALPHA BETA ACQUISITION CORP., and LUCKY STORES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

American Stores urges the Court to rewrite section 16 of the Clayton Act to prohibit any affirmative equitable relief from the injury threatened by violations of the antitrust laws, including section 7 of the Clayton Act. American Stores discusses none of the prior decisions of this Court, including *Zenith Corp. v. Hazeltine*, 395 U.S. 100 (1969) and *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), that would be overruled, *sub silentio*, by its proposed revision of section 16. American Stores' argument omits the most significant portions of the legislative history of the Clayton and Hart-Scott-Rodino Acts and misconstrues contemporaneous judicial interpretations of the Clayton Act.

To rationalize the principle that divestiture is not available to plaintiffs under section 16 of the Clayton Act, respondents advance a remarkable new proposition: that the phrase "injunctive relief" in the statute really means only "*prohibitory* injunctive relief" and that the federal courts may not grant *mandatory* injunctions under the statute. (Brief for Respondents ("BR") at 11.) American Stores asserts that in private actions the only "proper remedy for an already completed antitrust violation is a treble-damage action." (*Id.*, at 42.)

There should be no mistake about the devastation that rule would wreak on private enforcement of the antitrust laws. Not merely merger-law enforcement under section 7 of the Clayton Act is at stake. Section 16 is the instrument for private enforcement of all of the antitrust laws. If American Stores is right, a private plaintiff victimized by monopolization could not secure structural relief from the violation of section 2 of the Sherman Act; a victim of such *per se violations* as tying and group boycotts could not secure relief compelling the offenders to rescind the unlawful contracts or restore pre-violation competitive conditions. Once the ink was dry on any antitrust violation, courts of equity would be powerless to enforce the antitrust laws.

Fortunately, neither the language of section 16 nor its legislative history support this remarkable claim -- a claim that would overturn seventy-five years of antitrust precedent. Congress did intend the courts to exercise the full extent of their equitable powers to prevent "threatened loss or injury" caused by completed violations of the antitrust laws, and it gave effect to that intent in section 16.

I. THE LANGUAGE OF SECTION 16 DOES NOT RESTRICT THE COURTS' EQUITABLE POWERS

American Stores refuses to recognize that section 16 provides "injunctive relief against . . . threatened loss or damage *by a violation of the antitrust laws*." While section 16 requires that the *injury* flowing from unlawful conduct must be "threatened," there is no requirement in section 16 that the *antitrust violation* itself must be prospective. Notwithstanding American Stores' effort to revise the statutory language (e.g., BR at 19, 42), section 16 explicitly contemplates that injunctions will issue to prevent past or continuing antitrust violations from causing future injury.

That is precisely the situation facing California here. The District Court found, and the Court of Appeals affirmed, that California consumers were "threatened" with "irreparable loss or damage" as a result of American Stores' acquisition of Lucky Stores "in violation of the antitrust laws." (Pet. App. B at B24-B25; Pet. App. A at A16.) The "threatened loss" is the millions of dollars California consumers will pay due to reduced competition made possible in part by American Stores' "threatened conduct" in exercising the unlawful market power this merger would give it. (Pet. App. B at B19-B24.)[1]

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1. Indeed, given the posture of this case, the "threatened conduct" also includes completion of the Lucky and Alpha Beta merger. Respondent wrongly claims that California does not challenge the Ninth Circuit's finding that the Lucky merger was completed on June 9, 1988. (BR 7, n. 5.) The purchase of the Lucky stock that was not tendered was accomplished on that date by a short-form merger under Delaware law. But if the FTC hold-

American Stores challenges California to "explain the meaning of the limiting phrases 'threatened loss or damage' and 'threatened conduct that will cause loss or damage.'" (BR 13.) Both phrases simply reflect the traditional requirement for injunctive relief that equity courts have imposed: an injunction will not be granted absent the threat of future loss. As Justice Stone explained in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945):

> "The section [§ 16] provides that the relief to be given is an injunction 'against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. . . .' And even though, as asserted, the suit be maintainable in federal courts independently of the Clayton Act, the *controlling principles governing the maintenance of the suit are the same in either case. The plaintiff must show threatened injury* [citations], *for which he is without other adequate remedy* [citations], *and for which a court of equity is able to provide a remedy.*" (Dissenting opinion; emphasis added.)[2]

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separate order and the preliminary injunction in this case mean anything, the merger of Lucky and Alpha Beta is not complete. (Petition App. B at B21.) Even were the Court to conclude that "mandatory" relief was not available under section 16, it would still have to reverse the decision below because a permanent injunction prohibiting the integration of Lucky and Alpha Beta is indisputably *prohibitory* in nature.

2. The majority disagreed with Justice Stone on whether Georgia's citizens faced irreparable injury, but not with his construction of section 16. The Court's agreement with these basic principles led it to conclude that "[d]issolution of illegal combinations or a restriction of their conduct to lawful channels is a conventional form of relief accorded in anti-trust suits. No more is envisaged here. If the alleged combination is shown to exist, the

Nor is it any great mystery why these phrases are not included in section 15, which authorizes equitable actions by the federal government. Section 15 was simply a reenactment of section 7 of the original Sherman Act. (S.Rep. No. 698, 63rd Cong., 2d Sess. 50 (July 22, 1914).) The failure to include language limiting section 15 actions to those threatening the federal government with injury reflects the fact that the government is empowered to seek relief from violations of the antitrust laws irrespective of any injury from such violations. (*General Inv. Co. v. Lake Shore Ry.*, 260 U.S. 261, 286-87 (1922).) Private litigants, on the other hand, must show threatened injury. The phrase "threatened loss or damage" simply imposes a traditional standing limit on the rights of injured persons to sue, as do many other statutes creating important federal rights. (See, e.g., 15 U.S.C. § 15; 12 U.S.C. § 1464(q)(2)(A); 12 U.S.C. § 1976; 18 U.S.C. § 1964.)

Comparing the language of section 16 with that of section 15 refutes respondents' contrived distinction between the availability of "prohibitory" and "mandatory" relief under section 16. (BR 8, 13-19.) American Stores incorrectly claims that "section 15 of the Act authorizes the federal government, *without qualification*, to commence any 'proceedings in equity' to remedy a violation of the antitrust laws." (BR 12 (emphasis added).) To the contrary, section 15 expressly limits the federal government to relief in equity that will "prevent or restrain" violations of the law. (15 U.S.C. § 25.) Despite this overt limitation, American Stores concedes that the federal government may obtain "post hoc structural relief" under section 15, including divestiture.[3]

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decree which can be entered will be no idle or futile gesture. It will restore the degree of competition envisaged by Congress . . . ." (324 U.S. at 462.)

3. Contrary to respondents' claim (BR 12, n. 7), section 13(b) of the Federal Trade Commission Act expressly limits the courts' power to afford relief to the Commission to "issu[ing] a permanent injunction." (15 U.S.C. § 53 (b); see *FTC v. Dean Foods Co.*, 384 U.S. 597, 605-12 (1966).) Section 13(b) was added to the FTC Act by the Trans-Alaska Pipeline Act of 1973, Pub. Law No. 93-153, Tit. IV, § 408, 87 Stat. 591 (15 U.S.C. § 53(b)) in response to the *Dean Foods* case. (*Kintner* at 4950, n.10-8.) The history of this section shows that Congress knows how to restrict the courts' equitable powers when it desires to do so. Congress' failure to impose such clear restrictions in section 16 thus invokes the doctrine of *Porter v. Warner Co.*, 328 U.S. 395 (1946), as California urged. (Brief for Pet. at 12-14.)

(BR 11, 44-45; see *United States v. du Pont & Co.*, 366 U.S. 316 (1961).)

Unlike section 15, section 16 contains no language limiting its relief to that which would "prevent or restrain" violations. The "threatened loss" language in section 16 is surely no more limiting than the "prevent or restrain" restriction found in section 15. Indeed, this Court has equated the authority of the courts to provide effective relief under the two sections. (*General Inv. Co. v. Lake Shore Ry., supra*, 260 U.S. 261, 287.) American Stores' concession that divestiture is available under section 15 therefore puts to rest the strained distinction between "preventive" and "affirmative" relief under section 16.[4]

II. CONGRESS DID NOT INTEND TO LIMIT EQUITABLE REMEDIES UNDER SECTION 16

Respondents' argument for limiting the relief available under section 16 is fundamentally at odds with the statute's language and purpose. (BR 22-42.) The argument misinterprets the fragments of legislative history on which it

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4. This distinction, more semantic than substantive (see *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985)), lost its force in the antitrust arena long ago. (*United States v. American Tobacco Co.*, 221 U.S. 106 (1911).) Such traditional equitable distinctions, developed in a system with separate law and equity judges, have little relevance to the modern practices of federal courts. (*Gulfstream Aerospace Corp. v. Mayacamas Corp.*, ___ U.S. ___, 108 S.Ct. 1133, 1140-42 (1988).)

is based and gives a false sense of the tenor of the debates leading to adoption of the Clayton Act.

A. The Fundamental Debate in 1914 Was How Best to Address Inadequate Antitrust Enforcement by the Federal Government

Passage of the Clayton Act in 1914 culminated fourteen years of Congressional dissatisfaction with enforcement of the Sherman Act.[5] (E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* at 996 (1978) ("*Kintner*.")) To address this deficiency, Congress believed that the citizenry should be enlisted in the fight against the trusts. Congress did so and armed private litigants with the same right to injunctive relief it had conferred on the government. By the same token, Congress did not want to excuse the federal government from its duty to enforce the antitrust laws. To understand the legislative debates, therefore, one must realize that Congress' objective was to strengthen private enforcement without interfering with federal efforts.

B. The Debates on the Clayton Act Do Not Support Respondents' Limits on Section 16

1. Most of American Stores' legislative history argument rests on selected remarks in the hearings before a subcommittee of the House Judiciary Committee in February 1914. (BR 23-31.) The remarks concerned what was then section 13 of one bill, which American Stores says was adopted as section 16 of the Clayton Act with "minor irrelevant modification." (BR 13.)

What respondents dismiss as "irrelevant," however, is a fundamental difference between the bill before the committee and section 16 as enacted. The bill in question proposed amendments to the *Sherman Act* and would have

5. See, e.g., remarks of Rep. Clayton: "The Attorney-General can see no difference between ordinary business and an act which was a crime at common-law and has remained a crime for centuries." (33 Cong.Rec. A330 (1900).)

added section 13 to provide injunctive relief against unreasonable restraints of trade violating *that act*. The bill had no provision regarding anti-competitive mergers comparable to section 7 of the Clayton Act.[6] (*Kintner* at 1074-76.)

Divestiture is, as this court has long taught, a particularly appropriate remedy for a merger made unlawful under the incipiency standard of section 7. Passing remarks early in the consideration by one subcommittee of a bill dealing with remedies for private enforcement in an altogether different context are thus of scant relevance in interpreting the Clayton Act, which enacted entirely new substantive rules governing unlawful mergers.[7]

6. The bill referred to by respondents was one of four bills being considered by the subcommittee. The bill containing section 13 proposed amendments to the Sherman Act. Section 13 read:

> "That any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation *of this Act* when and under the same principles as injunctive relief against threatened conduct . . . is granted by courts of equity." (*Kintner* at 1075-76, emphasis added.)

As amended by the Senate and concurred in by the House, Clayton Act section 16 read:

> "That any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage *by a violation of the antitrust laws, including sections two, three, seven and eight of this Act* . . . ." (*Kintner* at 1067, emphasis added.)

7. All of the legislative history references cited by respondents concern the remedy of dissolution, not divestiture. There is a significant difference between the two remedies, however. (See *CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985).) The debates in 1914 make clear that Congress understood "dissolution" to mean the total destruction of offending trusts. (See, e.g., 51 Cong.Rec. S15863-64 (Sept. 29, 1914), Rep. Reed.) "Dissolution" is simply not the same as "divestiture," as this case proves. California is not suggesting the dissolution of American Stores, Lucky or Alpha Beta. Dissolution of the trusts discussed in the debates meant dissolving the corporations which had been brought under the umbrella of the great combinations such as the

2. The balance of respondents' citations to the legislative history are similarly flawed, reflecting either illustrative comments American Stores would make into legislative limits or quotations taken wholly out of context.

Illustrations, not Limits. Several times, American Stores quotes remarks illustrating how the bill would work as if they stated the outer limits of the bill's potency. For example, American Stores quotes three statements describing how section 16 would permit a private plaintiff to obtain an injunction against violations of the law (BR 31 (Rep. McGillicuddy), BR 34-35 (Rep. Floyd), BR 35, n.23 (Rep. Webb)), from which it concludes that the statute can *only* be used to restrain the "doing" of unlawful acts, rather than to prevent threatened loss resulting from such violations. While the Congressmen's statements accurately describe how a plaintiff might use section 16, they reflect no intent to *limit* the section's availability to those circumstances.

Mischaracterization of Sen. Nelson's Remarks. California noted in its opening brief that Sens. Nelson and Shields specifically stated during the debate immediately prior to passage of the Clayton Act that section 16 gave private plaintiffs the same remedies that were available to the federal government. (Brief for the Petitioner at 37-42.) American Stores seeks to avoid that devastating history by quoting a passage from Sen. Nelson that did not refer at all to section 16, but to a proposed section 24 regarding the power of the government to enforce its injunctions in

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Standard Oil trust. That is a far cry from making an acquiring firm divest the target company where, as here, it has held the target company under a hold-separate order since the acquisition. Even if "dissolution" were a generic term incorporating divestiture, as respondents claim, opposition by some members of Congress to the broader remedy of dissolution does not at all imply their opposition to divestiture, itself.

contempt proceedings.[8] (BR 35-36.) In the very same speech, Sen. Nelson made it clear that section 16 supported an injunction against completed acts such as an "existing" trust or monopoly. (51 Cong.Rec. S15944 (Sept. 30, 1914).) He told the Senate that it was particularly applicable to violations of section 7 of the Clayton Act. (*Ibid.*)

The House members who discussed section 16 during its debates on the conference bill agreed with Sen. Nelson. (E.g., 51 Cong.Rec. 16275 (Oct. 7, 1914), Rep. Webb; 51 Cong.Rec. 16276 (Oct. 7, 1914), Rep. Hardy.) During the final House debate, section 16 was said to confer on private litigants the power to seek relief "closing down" illegal operations, and the Representatives were assured that the measure was "as strong in civil remedies as a bill can be made." (51 Cong.Rec. 16276 (Oct. 7, 1914), Rep. Hardy and Rep. Webb.) The relief available to private parties under section 16 was again equated to that available to the federal government under section 15. (*Id.*, at 16276 (Oct. 7, 1914) Rep. Webb ("the remedies pile up, and all of the remedies are open to the individual and to the

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8. The focus of Sen. Nelson's remarks becomes clear when they are set forth in their correct context of his discussion of *In re Debs*, 158 U.S. 564 (1895). Sen. Nelson was complaining that section 24 appears to limit the rights of private litigants to seek contempt for violations of injunctions in ways the government was not limited:

> "The Debs case was a case on the part of the United States. If the provisions of section 24 as they are now had been in force at that time, it would not have changed the situation. This bill in section 24, does not change existing law in the manner of contempts where the United States is a party. It is only in suits of private parties; and those are very far and few between under the antitrust laws.
>
> "Does it not strike you, Senators, as a little unfair that by section 16 of this bill you have for the first time given private individuals the right to go into court and get injunctive relief as the Federal Government can get it, and then, after having given private individuals this remedy by injunction, you deprive them of the part of the remedies that the Federal has in a suit instituted by it." (51 Cong.Rec. S15946 (Sept. 30, 1914).)

Government. . . .").) Following these remarks, the bill was enacted unchanged. (51 Cong.Rec. S16170 (Oct. 5, 1914); 51 Cong.Rec. H16344 (Oct. 8, 1914).)

3. American Stores points out that Congress rejected an amendment to the Clayton bill proposed by Sen. Reed authorizing state attorneys general to "bring suit in the name of the United States to enforce any of the antitrust laws." (51 Cong.Rec. S14476 (August 31, 1914).) American Stores, however, fails to reveal the true nature of that amendment and the reason for its rejection.

Sen. Reed's purpose was to authorize the states to initiate *criminal* prosecutions in the name of the federal government because he was dissatisfied with the lack of federal criminal prosecutions under the Sherman Act. (51 Cong.Rec. S14519 ("[Sherman Antitrust Act] enacted over 20 years ago; since that time hundreds, if not thousands, of combinations in restraint of trade have been formed; and in all that time there has not yet been one man put behind the bars of a jail or of a penitentiary . . ."); see also, S14476 (Mr. Gallinger), S14478 (Mr. Walsh), S14515 (Smith), S14517 (Mr. Chilton), S14517 (Mr. Shafroth).) This Court noted in *Georgia v. Evans*, 316 U.S. 159, 162, n.1 (1942) that the Senate rejected the Reed amendment out of concern over permitting state officials to bring criminal prosecutions under federal law, not out of any desire to curtail the states' authority to obtain effective civil relief. (51 Cong.Rec. S14526-27.)

C. THE HART-SCOTT-RODINO ACT WAS NOT INTENDED TO RESTRICT RELIEF AVAILABLE UNDER SECTION 16

American Stores uses an equally unsatisfactory discussion of the history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a) to suggest that Congress renewed the alleged limits under section 16 preventing mandatory injunctive relief. In fact, just the opposite is true -- both the House and the Senate expressly acknowledged that they were leaving section 16 jurisprudence unchanged.

Respondents urge the Court to give dispositive weight to the remarks of Rep. Rodino, claiming that the House Conferences rejected private actions for divestiture.[9] (BR 40-42) However, respondents fail to mention that the Senate expressly rejected Rep. Rodino's views. (122 Cong.Rec. S15417 (Sept. 8, 1976).) Sen. Hart, the Senate co-sponsor, explained the impact of the House changes from the Senate version dealing with injunctive relief as follows:

> "The House supported the concept of State attorneys general being able to get injunctions to halt antitrust violations which were injuring their consumers, but the House felt that the Supreme Court's decision in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945) clearly authorized *parens patriae* suits for injunctive relief under section 16 of the Clayton Act.
>
> "The Byrd motion drops any mention of other than monetary relief because of the Senate concurrence with the House with respect to the right of the States to obtain appropriate relief under section 16 pursuant to the *Georgia* decision." (122 Cong.Rec. S15417.)

Georgia, of course, held that "[d]issolution of illegal combinations or a restriction of their conduct to lawful channels is a conventional form of relief accorded in antitrust suits." (324 U.S. at 462.) California seeks no more in this case.

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9. Respondents and their *amici* all erroneously assert that Rep. Rodino was speaking on behalf of a "conference committee." (BR 41; UFCW Brief 10; BT Brief 7; CRA Brief 9, n.5.) In fact there was no conference committee because the Senate refused to appoint conferees for fear that the debate over any resulting conference recommendations would provide another opportunity for the opponents of the HSR Act to filibuster the bill into defeat. (122 Cong.Rec. S29163-64 (Sept. 7, 1976), Sen. G. Hart.)

III. MANDATORY INJUNCTIONS HAVE LONG BEEN AVAILABLE UNDER SECTION 16

The ruling American Stores seeks in this case would overturn decades of section 16 jurisprudence permitting mandatory injunctive relief. For example, in *Zenith Corp. v. Hazeltine, supra*, 395 U.S. 100 (1969), the Court held that granting exclusive patent licenses to foreign patent pools, which restricted imports of plaintiff's products into foreign countries, violated section 1 of the Sherman Act. (395 U.S. at 105-106.) The Court concluded that a mandatory injunction to redress the continuing harm threatened by that violation was appropriate.[10] (395 U.S. at 129-33.) *Zenith* provides the framework for construing section 16:

> "That remedy is characteristically available even though the plaintiff has not yet suffered actual injury, [citation]; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." (395 U.S. at 130.)

The Court applied the same principles in *Silver v. New York Stock Exchange, supra*, 373 U.S. 341, 365 (1963), holding that the failure of the New York Stock Exchange to afford fair procedures before terminating wire services to non-member firms violated section 1 of the Sherman Act. That violation rendered the Exchange liable to the plaintiff for past damages under section 4 and for injunctive relief under section 16 of the Clayton Act. (*Ibid.*) The Court

10. The relief granted in *Zenith* plainly is mandatory since Hazeltine could comply with the injunction only by dissolving its exclusive licensing agreements with the foreign pools. (395 U.S. at 129-30.) The injunction also mandated Hazeltine to license patents to Zenith without certain unlawful conditions under section 16 based on patent misuse. (*id.*, at 130-34.) Such relief is, of course, essential if the private action is to continue playing a "central role" in enforcing the competitive regime contemplated by Congress. (*Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 635 (1985).)

ordered injunctive relief requiring the Exchange to provide "notice, a hearing, and an opportunity to answer charges to one who is about to be denied a valuable right" (373 U.S. at 364, n.17), relief that can scarcely be called "preventive."

Zenith and *Silver* were not revolutionary departures from this Court's section 16 jurisprudence. A long line of cases equates the relief afforded by section 16 to that afforded the federal agencies under section 15 of the Act. (See *Hawaii v. Standard Oil Co., supra*, 405 U.S. 251, 261; *General Inv. Co. v. Lake Shore Ry., supra*, 260 U.S. 261, 286-87; *FTC v. Dean Foods Co.*, 384 U.S. 597, 615 (1966) (dis. opn.); *Tigner v. Texas*, 310 U.S. 141, 148 (1940).)

These cases interpreting the scope of section 16 accord with two centuries of this Court's equity jurisprudence. Since *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 350 (1792), the Court has insisted that once the courts' equitable powers are properly invoked, they may exercise the full breadth of those powers to ensure effective relief. (*Clark v. Smith*, 38 U.S. (13 Pet.) 195, 202-203 [13 Pet. 173] (1839).) The Court has been vigilant in preserving the power of Article III courts to enforce federal rights ever since. (*Hayburn's Case*, 2 U.S. (2 Dall.) 355 (1792); *Brown v. Swann*, 35 U.S. 331 (1836); *Porter v. Warner Co., supra*, 328 U.S. 395 (1946); *TVA v. Hill*, 437 U.S. 153, 193-95 (1978).)

The courts may order mandatory injunctions when necessary to preserve federally created rights. (*In Re Lennon*, 166 U.S. 548, 556 (1897).) This is true whether or not the statutory scheme creating federal rights expressly confers a private right to equitable relief and irrespective of the precise language of the statute conferring equitable powers on the courts. In *J.I. Case Co. v. Borak*, 377 U.S. 426, 431-35 (1964), the Court rejected the argument that section 27 of the Securities Exchange Act of 1934, which authorized courts "to enjoin any violation" of the act, was limited to prospective relief; rather, the section was held to incorporate a private right of action for individuals injured by violations and, specifically, to *permit courts to rescind completed merger transactions*. The Court noted:

"[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. *Bell v. Hood*, 327 U.S. 678, 684 (1946)." (377 U.S. at 433.)

Accord, *Mills v. Electric Auto-Lite*, 396 U.S. 375, 386-89 (1970); cf. *Deckert v. Independence Corp.*, 311 U.S. 282, 288-90 (1940).) That principle applies equally to section 16.

IV. EARLY JUDICIAL CONSTRUCTION OF SECTION 16 DOES NOT SUPPORT THE LIMITS ON SECTION 16 URGED BY AMERICAN STORES

American Stores' attempt to revise history is nowhere more clearly shown than in its treatment of the first three decisions of this Court construing section 16. (*Fleitmann v. Welsbach Co.*, 240 U.S. 27, 29 (1916); *Duplex Co. v. Deering*, 254 U.S. 443, 464 (1921); *General Inv. Co. v. Lake Shore Ry., supra*, 260 U.S. 261, 286; BR 8, 19-20.) In *Fleitmann*, the Court did not hold that section 16 precluded restitution or was even limited to "preventive" relief as American Stores suggests. (BR 19.) Rather, the Court held that shareholders of a corporation could not assert the corporation's right to seek treble-damages by the mechanism of a derivative action. (240 U.S. at 28-29.) The Court grounded its conclusion solely on the fact that such a use of the equity court would deprive the defendants of their right to a trial by jury. (*Ibid.*)

American Stores' claim that the Court in *Duplex Co. v. Deering* applied section 16 retroactively because "the statute applied only to prevent future acts" is likewise not true. The Court held that plaintiffs were entitled to injunctive relief against threatened injury resulting from an ongoing secondary boycott in an action filed prior to passage of the Clayton Act. (254 U.S. at 464, 478-79.) The Court never

mentions or even suggests that section 16 is limited to injunctions restraining only future acts.[11]

Respondent is equally wrong in its assertion that *General Inv. Co. v. Lake Shore Ry.* held that "section 16 enables plaintiffs threatened with loss or damage to maintain suits to 'enjoin' (i.e. prevent) *threatened violations*."[12] (BR 20, emphasis added.) Far from supporting American Stores' crabbed construction of section 16, *General Inv. Co.* confirms the broad injunctive powers of the district court under that statute. The Court equated the remedies available to private litigants under section 16 with the remedies available to the government under section 15. (260 U.S. at 286-87.) Regarding the private remedy, the Court said it "enabl[ed] persons and corporations threatened with loss or damage through *violations of that act to maintain suits to enjoin such violations*, . . ." (260 U.S. at 287, emphasis added.) Clearly, the authority to "enjoin such violations" under section 16 is precisely the same authority given to district courts under section 15 to "prevent and restrain violations."[13]

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11. The Court did say that section 16 operates "in futuro," an apparent reference to the phrase "against threatened loss or damage." (BR 20.) But that simply means that only future irreparable injury may be addressed by courts of equity; past injury capable of measurement is compensable by damages.

12. The Court in *General Inv. Co.* never uses the expression "threatened violations," as American Stores claims. (BR 20.) Indeed, the Court — like the statute — referred to "threatened . . . loss or damage," a very different requirement. (See *supra*, at 2-3.) This Court recently condemned similar efforts to modify the clear import of authorities by misleading additions of words to the text. (*Associated General Contractors v. Carpenters*, 459 U.S. 519, 525 n.9 (1983).)

13. The three lower court decisions cited by respondents do not support their argument. (*Venner v. Pennsylvania Steel Co.*, 250 F. 292 (D.N.J. 1918); *Graves v. Cambria Steel Co.*, 298 F. 761 (D.N.Y. 1924); *Continental Securities Co. v. Michigan Cent. R. Co.*, 16

V. THE POLICIES UNDERLYING THE NATION'S ANTITRUST LAWS REQUIRE PERMITTING DIVESTITURE IN PRIVATE ACTIONS

The policy arguments advanced by American Stores and its *amici* for precluding divestiture under section 16 must be rejected. Though couched in a variety of formulations, respondents' policy arguments all rest on a common refrain: allowing anyone other than the federal government to seek effective injunctive relief will be costly to merging firms. (BR 43-47; see also BT Brief 9-14.) At bottom, respondents challenge not just the right of private parties to obtain divestiture as a remedy, but the entire premise of private enforcement of the antitrust laws.

Congress was of a different view, well-aware that in authorizing private actions under section 16, it might be opening the door to multiple suits that could impose significant costs on merging firms. Indeed, for firms found to have violated section 7, that was one of the primary purposes of enlisting private citizens in the enforcement effort. (See 51 Cong.Rec. H16275 (Oct. 7, 1914), Rep. Webb: "Under the civil remedies any man throughout the United States, hundreds of thousands, can bring suit in various jurisdictions, and thus the offender will begin to open his eyes because you are threatening to take money out of his pocket.") But even if the private action were not

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F.2d 378 (6th Cir. 1926), cert. denied, 274 U.S. 741 (1927).) The issue whether a person actually threatened with injury by a violation of section 7 could secure divestiture was not presented in any of the cases; all were shareholder-derivative actions brought by plaintiffs who failed to satisfy section 16's requirement of "threatened injury." Moreover, each case arose in the context of a demand for "dissolution," not divestiture of stock acquired in the face of a hold-separate order. (See note 10, *supra*.) Finally, none of the three discusses the legislative history or policies underlying section 16, an omission that led even the Ninth Circuit to reject them as persuasive precedent. (*International T. & T. Corp. v. General T. & E. Corp.*, 518 F.2d 913, 921 (9th Cir. 1975).)

always successful, Congress concluded that the incremental cost to merging firms was far outweighed by the benefits that effective private enforcement of the antitrust laws would produce for the country's economy.

1. Respondents' suggestion that allowing divestiture under section 16 will preclude "responsible filtering" by the federal agencies (BR 45-47) is little more than a plea for immunity buried in their effort to revisit the very issue Congress decided in 1914. "Filtering" deals only with the exercise of prosecutorial discretion by the federal agencies in allocating their own limited resources. Those agencies have never been authorized to "approve" mergers; they only decide whether to prosecute violations. Respondents, however, would like to convert this prosecutorial "filter" into a federal license immunizing all mergers that for one reason or another are not blocked by the federal government.

Implicit in respondents' "filtering" argument is the acknowledgement that Congress placed the ultimate responsibility for determining which mergers violate the antitrust laws not in the federal agencies, but in the courts. Yet, respondents and their *amici* display a grave mistrust of the courts' ability to use the myriad tools at their command, including summary dispositions and sanctions, both to weed out "irresponsible" cases and to determine the appropriateness of the divestiture remedy in any given case. Congress displayed no such mistrust.

Respondents clearly overstate the threat from private litigation, ignoring both the enormous expense such suits entail and the heavy burden of proof that a plaintiff must overcome in order to obtain divestiture. No authority is cited and none exists suggesting that the risk of "multiple and *seriatim*" lawsuits is genuine.

Perhaps most fundamentally, Congress itself was not satisfied with the federal "filtering" process. Indeed, that is precisely why section 16 was enacted -- to supplement the federal enforcement program with private actions. The findings of the courts below that the Lucky acquisition almost certainly violates section 7 and threatens irreparable

injury, despite the FTC consent order, demonstrates the value of such actions even when one of the federal agencies has acted. The federal enforcement authorities are not infallible. They do not have unlimited resources. They are often forced to settle for less than full compliance with section 7. They may make prosecutorial decisions based on views of antitrust policy that are at odds with settled precedent, or that reflect changing political or economic thinking not in conformance with the policies of the antitrust laws -- precisely the conditions that moved Congress to adopt the Clayton Act. These are all matters that Congress thoroughly considered, ultimately concluding that private actions were needed to insure effective enforcement of the antitrust laws.

2. The availability of a private divestiture remedy under section 16 in no way interferes with the federal merger enforcement program. Contrary to respondents' claims, these programs were not intended to guarantee "predictability in merger enforcement," nor do they provide federal antitrust enforcement authorities with "the final word on whether a transaction will be challenged after the fact." (BR 47.) In several circuits, divestiture has been an available remedy under section 16; as respondents themselves note (*id.* at 49 n.29), several states presently permit divestiture under state law. Yet respondents and their *amici* are unable to point to a single instance in which the availability of divestiture in these jurisdictions caused any of the claimed interference with federal enforcement.[14]

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14. Even in the absence of a divestiture remedy under section 16 or state law, merging firms would receive no assurance that their proposed transaction would not be upset by a private lawsuit. If, for example, California had filed this suit one day after American Stores and the Commission had published their tentative consent agreement, and had secured a preliminary injunction preventing the stock acquisition, all of the purported problems of interfering with the federal HSR Act review would still be implicated. Moreover, the district court would have been injected into that review even before the Commission made its final

The threat made by the Business Roundtable (BT) and the California Retailers Association (CRA) that their members will refuse to cooperate with the federal agencies if private parties are allowed any form of mandatory injunctive relief under section 16 (BT Brief at 13-15; CRA Brief at 6-16) must be rejected as both implausible and irrelevant. Surely, the *amici* do not expect this Court to believe that firms, facing objections by the Antitrust Division to their proposed mergers, would be reluctant to settle with the Division *solely* out of fear that another party might later file suit and convince a court that the government's settlement did not solve the structural antitrust concerns raised by the merger. And if a private party were able to convince the court of the need for additional relief, affirmative or otherwise, then the antitrust policies would have been well served -- not frustrated -- by the availability of the private divestiture remedy.

3. Finally, pervading respondents' entire policy argument is the suggestion that mergers necessarily involve

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determination. None of the purported difficulties regarding the consent agreement negotiations between the respondents and the Commission would have been solved either. Respondents still would have confronted the need to settle with the Commission over its complaint and with California over its complaint.

American Stores' assertion that substantial divestitures would have been avoided had they known that they might have faced subsequent claims for structural relief under section 16 is wrong. First, American Stores did not make substantial divestitures; in its consent decree with the Commission, it agreed to divest less than 7% of the California stores in a combined Lucky/Alpha Beta chain. Second, the threat of a private action under section 16 did not deter American Stores from reaching an agreement with the Commission; American Stores was willing to settle even though California repeatedly warned it that the tentative consent agreement was not adequate and that the state would bring suit. American Stores simply chose to ignore those warnings. (Pet. App B at B-23.) Thus, respondents would still have faced the necessity of negotiating with California and any other potential plaintiffs regardless of the availability of structural relief under section 16.

national economic policies and that therefore only the federal authorities should be allowed to address the structural relief questions raised by such transactions. (BR 46-49; BT Brief 9-14; 16-24.) The short answer to this claim is that it is simply wrong, at least with respect to this merger and many others that will confront the courts in the future. This merger specifically threatens California citizens with the injury that the lower courts found will result from the integration of Lucky and Alpha Beta. (Brief for the Petitioner 5-7.) All of the policies underlying the Clayton Act compel the conclusion that California should be allowed to secure whatever relief is necessary in order to prevent that injury from occurring. (*Id.*, 18-35.)

CONCLUSION

American Stores invites the Court to challenge the concurrent federal and private enforcement regime Congress so carefully drafted in 1914 and improved in 1976. In fact, respondents seek to emasculate that regime. As respondents would have it, the fourth largest firm in an essential industry in the nation's largest state can acquire the largest firm, the acknowledged low-price leader, for the purpose of commanding twenty-five cents out every supermarket dollar spent by Californians. American Stores claims immunity from judicial antitrust scrutiny of that merger because, in the space of 17 days, it secured the agreement of Lucky to the acquisition and the tentative non-reviewable decision of a federal agency not to press its acknowledged antitrust concerns with the merger. Only the Congress could allow such evasion of the policies of the Clayton Act. It has not done so, and neither should this Court. Accordingly, the decision below should be reversed.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On December 28, 1989, I served the within Reply Brief for the Petitioner in re: "State of California -v- American Stores Co., Alpha Beta acquisition" in the United States Supreme Court, October Term 1989, No. 89-258, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 28, 1989, at Los Angeles, California.

Marysue Bushner

MARYSUE BUSHNER